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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~479.~~ 833 944

WILLIAM J. McCOMB, SURVIVING EXECUTOR OF ROBERT McCOMB, DECEASED, PLAINTIFF IN ERROR,

vs.

THE COUNTY COMMISSIONERS OF KNOX COUNTY, OHIO.

IN ERROR TO THE COURT OF COMMON PLEAS FOR THE COUNTY OF RICHLAND, STATE OF OHIO.

FILED DECEMBER 4, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 473.

WILLIAM J. McCOMB, SURVIVING EXECUTOR OF ROBERT McCOMB, DECEASED, PLAINTIFF IN ERROR,

vs.

THE COUNTY COMMISSIONERS OF KNOX COUNTY, OHIO.

IN ERROR TO THE COURT OF COMMON PLEAS FOR THE COUNTY OF RICHLAND, STATE OF OHIO.

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1 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the county commissioners of Knox County, in the State of Ohio, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the court of common pleas for the county of Richland, in the State of Ohio, wherein William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable William Osborn, presiding judge of the court of common pleas for the county of Richland, in the State of Ohio, this 9th day of November, A. D. 1871.

WILLIAM OSBORN,
Presiding Judge of the Court of Common Pleas for Richland County, Ohio.

(Indorsed:) Service of the within is hereby acknowledged, by reading and also by copy, Nov. 9, 1871.

W. H. SMITH & W'M McCLELLAND,
Att'ys for the Com'rs of Knox County.

3 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the court of common pleas for the county of Richland, in the State of Ohio, greeting:

Because, in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said court of common pleas before you, between The County Commissioners of Knox County, Ohio, plaintiffs, and William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, defendant, a manifest error hath happened, to the great damage of the said William J. McComb, as such executor as aforesaid, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 8th day of November, in the

year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States of America the ninety-sixth.

[SEAL.] Attest: EARL BILL,
Clerk of the Circuit Court of the United States within & for the Northern District of Ohio.

Allowed by—

N. H. SWAYNE,
Asso. Jus. S. C't U. S.

(Indorsed:) In the Supreme Court of the United States. W'm J. McComb, executor, &c., of Rob't McComb, dec'd, vs. The County Commissioners of Knox County, Ohio. Writ of error.

4 UNITED STATES OF AMERICA, *ss:*

THE STATE OF OHIO, *Richland County ss:*

To the honorable the Supreme Court of the United States, greeting:

In obedience to the requirement of your writ of error hereto appended, and to which this and the accompanying transcript and proceedings is our return, to the judges of our court of common pleas, in and for the county of Richland, in the State of Ohio, directed. I, George B. Harmon, clerk of said court of common pleas, by order of the judges thereof, certify and make return, that the transcript of the record and proceedings hereto attached, and certified under the seal of our said court, is a full, true, and perfect copy of the record, proceedings, and judgment of our said court, in the civil action lately pending therein, wherein The County Commissioners of Knox County, in the State of Ohio, were plaintiffs, and William J. McComb, surviving executor of Robert McCombs, deceased, was defendant in your said writ of error referred to; that final judgment was rendered by our said court, in said action, on the 28th day of August, A. D. 1871, at the August term of said court, in the year last aforesaid, that the plaintiffs recover of the defendant in his said capacity of executor, the sum of six thousand and fifty-six and $\frac{40}{100}$ dollars assessed by the court, together with their costs, in and about said suit in that behalf expended, to be taxed by the clerk of said court, as by the record and proceedings aforesaid fully appears.

And further, it is certified, returned, and made known to your honorable court that the Honorable William Osborn, one of the judges
5 of our said court, by whom the same was holden at the time of the rendition of the judgment aforesaid, and still is the presiding judge of said court, by whom also the citation hereto attached was signed, and the bond and surety upon said writ of error approved.

Witness my hand and the seal of said court of common pleas, at the city of Mansfield, in said county of Richland, this 9th day of November, A. D. 1871.

[SEAL.] GEO. B. HARMON, *Clerk.*

6,7 *Assignment of errors.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States. December term, A. D. 1871.

WILLIAM J. McCOMB, SURVIVING EXECUTOR of the last will of Robert McComb, deceased, plaintiffs,
vs.
THE COUNTY COMMISSIONERS OF KNOX County, in the State of Ohio, defendants. } In error.

William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, plaintiff in error, says and avers, that, in the proceedings and judgment of the court of common pleas of Richland County, in the State of Ohio, (an exemplified copy of which, and of the proceedings in and upon which the same was given and rendered is herewith exhibited,) wherein The County Commissioners of Knox County, in the State of Ohio, were plaintiffs, and he, the said William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, was defendant, the said court, being the highest court of said State in which a decision therein could be had, and the same being final, error hath intervened to his injury and prejudice, in this: That the said court, being thereto required by the mandate of the supreme court of the State of Ohio, to which it was
8 inferior and subordinate, gave and rendered judgment in favor of the said County Commissioners of the county of Knox, the plaintiff below, and against him the said William J. McComb, executor, &c., the defendant below, as in and by the said record the same appears and is set forth; whereas but for the said judgment and rulings of the said supreme court, and which the plaintiff avers were and are erroneous and to the injury of the plaintiff as herein particularly alleged and set forth, the said judgment of said court of common pleas should, in law, and would have been, given and rendered in his, the said plaintiff's favor, and against the said County Commissioners, the defendants in error. And the plaintiff avers and says that said judgment of said supreme court, in the record aforesaid contained and set forth, in obedience to which the said judgment of said court of common pleas was given and rendered as aforesaid, was and is erroneous, to the prejudice and injury of the plaintiff in error, in this: That the said supreme court erred in overruling the demurrer of the plaintiff in error, defendant below, to the replies of the plaintiffs below to the answers of the defendant below, and in holding and adjudging that the answers of the defendant below did not set forth any matter sufficient in law to bar the said action of the plaintiff below; and further, particularly in this, in holding and adjudging that the said 5th section of the said special act of the general assembly of the State of Ohio, in the amended answer of the de-
9 fendant below referred to, passed February 26th, 1846, was repealed by implication by the 25th section of the act of the general assembly, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1, 1852, in the record of said judgment of the said supreme court referred to, and that the said County Commissioners were thereby authorized, notwithstanding the restrictions of said special act, and in disregard thereof, to contract with the testator of the plaintiff in error to sell and transfer to him the said railroad stock, disencumbered of the lien of the holders of the bonds of the county, secured to them by the provisions of said special act.

Wherefore the said William J. McComb, surviving executor, &c., of the said Robert McComb, deceased, prays that the said judgments may be reversed, annulled, and made void, and that he may be restored to all things he has lost thereby.

A. G. THURMAN,
Attorney for W'm J. McComb, Executor as aforesaid.

10 Pleas continued and held at the court-house in the city of Mansfield, within and for the county of Richland, in the sixth judicial district of the court of common pleas of the State of Ohio, before the

Hon. William Osborn, judge of the second sub-division of the said sixth judicial district, at the March term thereof, to wit, on the nineteenth day of March, A. D. one thousand eight hundred and sixty-seven.

THE COMMISSIONERS OF KNOX COUNTY, PL'FFS, *against* WILLIAM J. McCOMB, JOSHUA DAVIS, JR., EXECUTORS of Robert McComb, deceased, defendants. } Civil action.

Be it remembered that, heretofore, to wit, on the 29th day of May, A. D. 1866, the plaintiffs herein filed in the office of the clerk of the court of common pleas within and for the county of Richland, and State of Ohio, their certain petition against the defendants herein, and which said petition is in the words and figures following, to wit:

Petition.

In the court of common pleas of Richland County, Ohio.

THE COMMISSIONERS OF KNOX COUNTY, OHIO, plaintiffs, *against* WILLIAM J. McCOMB AND JOSHUA DAVIS, JR., executors of Robert McComb, deceased, defendants. } Petition.

The said commissioners of Knox County, Ohio, plaintiffs, complain of the said William J. McComb and Joshua Davis, jr., executors of the last will and testament of Robert McComb, deceased, and say that they, the said Commissioners, were, on the 30th day of September, A. D. 1853, the lawful owners of one hundred shares of the stock of the Columbus & Lake Erie Railroad Company, and being such owners, they did, on the said 30th day of September, A. D. 1853, transfer the said stock to the said Robert McComb, then in full life; and
11 the said Robert McComb, in consideration thereof, then promised the said plaintiff in writing, that he would pay them, the said Commissioners, therefor, the sum of five thousand dollars, on or before the 1st day of June, A. D, 1867, with interest on said sum from and after the 1st day of October, A. D. 1853, the said interest to be payable annually on the first day of October of each year. It was further provided by said writing that said principal sum or any part thereof, might be paid at the office of the county treasurer of said Knox County, either in money or the bonds of said county, which had been issued by said county in payment of its subscription for stock in the said railroad company, such payment to be evidenced by the said treasurer's receipt therefor; and it was further provided that in like manner the interest to accrue on said sum should be paid to the said treasurer at his office, either in money or by the application of interest that had accrued on the above-named bonds issued by the said county. A copy of said writing and the endorsement thereon, is hereto attached, marked "A," and made a part of this petition. Plaintiff further say that the said Robert McComb did, on the said 30th day of September, A. D. 1853, and at the time of the said purchase of stock, and as a part consideration therefor, execute and deliver to the said plaintiffs a written pledge,

and hypothecation of said one hundred shares of stock, to secure the payment of said sum of five thousand dollars and its interest as aforesaid. A copy of said pledge is hereto attached, marked "B," and made a part of this petition.

Plaintiffs further say that the said Robert McComb did not, in his lifetime, nor have his said executors, since his death, paid any sum whatever on said obligation, as principal or interest, either in money or in the bonds of the said Knox County, or by the application of any interest that had accrued on the said county bonds.

And plaintiffs further say that there is now due to them from the said defendants, as executors as aforesaid, for interest accrued on the said obligation, the sum of four thousand seven hundred and eighty-eight dollars, with interest on the same since the first day of October, A. D. 1865. Plaintiffs on the 13th day of December, A. D. 1865,
12 presented to the said defendants, as executors, as aforesaid, a true account of the aforesaid claim against the estate of the said Robert McComb, deceased, duly authenticated, and demanded their indorsement thereon of its allowance as a valid claim against said estate, which indorsement and allowance the said excutors refuse to make, but on the contrary, rejected the said claim. Plaintiffs ask judgment against the said defendants as executors as aforesaid, for the sum of four thousand seven hundred and eighty-eight dollars, with interest on the same since the first day of October, A. D. 1865.

W. H. SMITH,
Att'y for Pl'ffs.

EXHIBIT "A."—*Copy of paper marked "A."*

In consideration of one hundred shares of the stock of the Columbus and Lake Erie Railroad Company, transferred to him by the county commissioners of Knox County, aforesaid, the sum of five thousand dollars, on or before the first day of June, A. D. 1867, with interest, to be paid annually, on the first day of October, from and after the first day of October, A. D. 1853, payment of which said principal sum, or any part thereof, may be made at the office of the county treasurer of said county, in money or in the bonds of said Knox County, issued in payment of said county's subscription for its stock in said railroad company, to be evidenced by said treasurer's receipt therefor; and, in like manner, the interest to accrue on this obligation shall be paid to said treasurer at his said office, in money, or by the application of interest accrued upon the bonds above named of the county.

Given under my hand this 30 day of September, A. D. 1853.

ROBERT McCOMB.

Said writing is endorsed as follows:

"The payment of the money within named is secured by a pledge or hypothecation of the stock within named to the said County Commissioners, bearing even date herewith.

EXHIBIT "B."—*Copy of paper marked "B."*

The undersigned, Robert McComb, being indebted to the county commissioners of Knox County, Ohio, in the sum of five thousand dollars, payable on or before the 1st day of June, A. D. 1867, at the office of the county treasurer of said county, with interest thereon payable annually on the first day of October, from and after the first day of October, A. D.

1853, as by the written undertaking, to said county commissioners,
13 bearing even date herewith, more fully appears, hereby pledge and hypothecate to said county commissioners of Knox County, Ohio, as a security for the payment of said indebtedness according to said undertaking, the same one hundred shares of the capital stock of the Columbus and Lake Erie Railroad Company which were transferred to him by said commissioners, as the consideration for said indebtedness; the certificate of which stock bears even date herewith, and has written upon the same, a memorandum of the fact of this pledge, and is numbered twenty-six. This pledge is made subject to the following terms and conditions:

First. If said indebtedness shall be well and truly paid, with the interest to accrue thereon, according to the terms and conditions of said undertaking, this pledge is to be void.

Second. If default be made in the payment of the principal sum of said indebtedness, or of any installment of any interest to accrue thereon, for the period of fifty days after the same shall become due and payable, according to the terms of said undertaking, the said commissioners are hereby fully authorized, *and* at any time after thirty days' notice of the time and place of sale, published in some newspaper of general circulation in said Knox County, to sell and dispose of said stock at public vendue, at the court-house door in said county, for the best price to be had therefor in money. The proceeds, after paying necessary expenses, to be applied in payment of the principal and interest of said indebtedness, and the residue, if any, to be paid over to him or his assigns, (subject to this pledge,) of said stock: *Provided, however*, that he or his said assigns shall have the right at any time before such sale is concluded to redeem said stock from liability to be sold by paying of the amount due of principal and interest, according to said undertaking of said indebtedness, with all necessary expenses incurred with a view to such sale: *And provided further*, That, in case of the death of the grantor of this pledge, no sale shall be had of said stock until after the expiration of eight months after the death of said grantor.

Third. If a consolidation shall be effected according to law, of the said Columbus & Lake Erie Railroad Company and the Mansfield and Sandusky City Railroad Company, whereby the grantor of this pledge
14 shall become entitled to stock in the new company to be formed by such consolidation, said grantor, at the time of receiving said new stock, shall pledge the same to said county commissioners, subject to the same conditions annexed to this pledge, and thereupon this pledge shall become void.

Fourth. The grantor of this pledge or his assigns thereof, shall have the right at any time hereafter, to have this pledge canceled and given up upon substituting in lieu thereof any other security acceptable to the commissioners, and in case of a partial payment of the principal sum of said indebtedness the grantor shall have the right to have a proportional part of the stock, hereby pledged or which may hereafter be pledged, in the new company released.

ROBERT McCOMB.

SEPTEMBER 30TH 1853.

THE STATE OF OHIO, *Richland County, ss:*

I, W. H. Smith, being sworn, say that I am the attorney of the said plaintiffs; that the said plaintiffs are non-residents of the said county of Richland; that the obligations on which this suit is brought, are in my

possession, and that I believe the statements of the foregoing petition to be true.

W. H. SMITH.

Sworn to before me, and subscribed in my presence this 29th day of May, A. D. 1866.

W'M S. HIGGINS,
Deputy Clerk.

And thereupon on the precipe of plaintiff's attorney, a writ of summons was issued against the defendants herein as follows, viz:

Summons.

THE STATE OF OHIO, *Richland County, ss:*

To the sheriff of the county of Richland:

You are commanded to notify William J. McComb & Joshua Davis, jr., executors of Robert McComb, deceased, that they have been sued by the commissioners of Knox County, Ohio, in the court of common-pleas of Richland County, & that, unless they answer by the 30th day of June, A. D. 1866, the petition of said plaintiffs against them filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 11th day of June, 1866.

Witness William Ritter, clerk of said court, and the seal thereof, at the city of Mansfield, this 30th day of May, A. D. 1866.

[SEAL.] W'M RITTER, *Clerk.*
By W'M S. HIGGINS, *Deputy.*

Endorsement on summons.

Summons endorsed thus: "Summons in action for an obligation given for stock in the Columbus and Lake Erie Railroad Company." Amount claimed, $4,788 00, with interest since October 1st, 1865.

Sheriff's return.

And afterwards, to wit, on the eleventh day of June, A. D. eighteen hundred and sixty-six, the said writ was returned to the clerk's office aforesaid, by said sheriff, endorsed as follows, to wit: Received this writ June 2nd, A. D. 1866, and served the same on the within-named Joshua Davis, jr., June 8th, A. D. 1866, by leaving a true certified copy thereof at his place of residence, William J. McComb not found in my bailiwick, and returned this writ June the 11th, A. D. 1866.

J. C. FAIR, *Sheriff.*

And afterwards, to wit, on the 14th day of July, A. D. 1866, an alias summons was issued to the sheriff of said Richland County, in the words and figures following, to wit:

Alias summons.

THE STATE OF OHIO, *Richland County, ss:*

To the sheriff of the county of Richland:

You are commanded to notify William J. McComb, ex'r of Robert

McComb, dec'd, that he has been sued by the commissioners of Knox County, Ohio, in the court of common pleas of Richland County, and that unless he answers by the 10th day of August, A. D. 1866, the petition of said plaintiffs against him filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 23 day of July, 1866.

Witness William Ritter, clerk of said court, and the seal thereof at the city of Mansfield, this 14th day of July, A. D. 1866.

[SEAL.] W'M RITTER, *Clerk.*

Endorsement on summons.

Upon which writ was the following endorsement, to wit: "Summons in action for the recovery of money." Am't claimed, $4,788 00, with interest from October 1st, 1865."

Summons returned & app. of W. J. McComb, ex't.

And afterwards, to wit, on the 21st day of July, A. D. 1866, said writ was returned with the following indorsement thereon, to wit: "I hereby waive the issuing and service of process herein, & enter the appearance of W'm J. McComb, ex'r, &c., herein, this 21st day of July, A. D. 1866.

HENRY C. HEDGES,
Att'y for W'm J. McComb.

And afterwards, to wit, on the 28th day of July, A. D. 1866, the said defendants filed in the clerk's office aforesaid, their answer to the petition of plaintiffs, which is in the words and figures following, to wit:

Answer of def'ts.

In Richland com. pleas, O.

THE COMMISSIONERS OF KNOX COUNTY, PLAINTIFFS, *against* WILLIAM J. MCCOMB & JOSHUA DAVIS, EXECUTORS of Robert McComb, deceased, defendants. } Answer.

16 The said defendants, for answer to the petition of the said plaintiffs, say that, by a special act of the general assembly of the State of Ohio, entitled "An act to authorize the commissioners of Knox and other counties to take stock in a railroad," passed February 26, A. D. 1846, the plaintiffs were authorized on certain conditions in said act specified to become subscribers to an amount not exceeding one hundred thousand dollars to the capital stock of any railroad company by whose road a direct communication should be opened through said county of Knox, and to or near its county-seat; and in payment of the stock subscribed by them, they were further authorized by said act to issue bonds or obligations of said county of equal amount payable to such company, to be negotiable, to bear interest at the rate of six per cent. per annum, payable annually at the treasury of the county, and to be redeemable at such time as they might deem expedient, but not over twenty years from date.

The plaintiffs, by virtue of the powers conferred upon them by said act, subscribed one hundred thousand dollars to the capital stock of the Columbus and Lake Erie Railroad Company, and in payment thereof, in pursuance of the provisions of said act, issued the bonds of said county, five hundred of which *was* of the denomination of $100 each, and one thousand of which were of the denomination of $50 each, a portion of each denomination being dated November 1, 1847, and the remainder March 1, 1848, and all of which were made payable June 1, 1867, with interest payable on the 1st of January of each successive year. A true copy of the body of all of said bonds (date, number, and amount excepted) is hereto attached, marked "A," and made a part of this answer. For the payment of the indebtedness of the county thus created, and the interest thereon, it was expressly provided, among other things, by said act, that the faith of the county and the net profits or dividends upon the stock so subscribed should stand pledged to the holders of said bonds.

The plaintiffs were also by said act specially authorized, in order to pay off such indebtedness, to sell and transfer, whenever they might deem the same expedient, any or all of the stock so subscribed or owned by said county; but it was expressly provided by said act that no sale or transfer of the stock thus owned by said county should be of any force, except under condition of its producing its full par value
17 and the actual extinguishment or cancellation of an equivalent amount of said obligations of said county, created under said act.

Defendants further say that the one hundred shares of stock in the petition mentioned, were parcel of the stock so subscribed and paid for by the plaintiffs as aforesaid, and the par value thereof, on the said 30th day of September, A. D. 1853, was five thousand dollars in money. The alleged sale and transfer of said stock did not produce its full par value nor did it extinguish or cancel an equivalent or any amount of the said obligations of said county created under said act. The only consideration of said sale and transfer of said stock was the supposed obligation of the said Robert McComb, set forth in the petition, and the consideration of the said supposed obligation of said McComb was the said sale and transfer of said stock.

Defendants further say that the sale and transfer of said stock, so made by the plaintiffs as aforesaid, was not only without legal authority and power on their part, but was illegal and in violation of the said statute of the State of Ohio, and the same was wholly void and conferred no valid right upon said McComb to said stock; they, also, say that the supposed obligation and agreement of said McComb in the petition set forth was without consideration and is null and void.

A. G. THURMAN,
R. C. HURD, AND
HENRY C. HEDGES,
Att'ys for Def'ts.

THE STATE OF OHIO, *Richland County, ss:*

Henry C. Hedges makes oath and says that he is one of the attorneys of the defendants; that both of said defendants are absent from the county of Richland at this time, said Davis in Cincinnati, Ohio, and said McComb in Detroit, Michigan, and have been and expect to be absent for a period of time. Affiant, therefore, makes this verification and further states that he believes the allegations of the foregoing answer to be true.

HENRY C. HEDGES.

Sworn to before me & subscribed in my presence July 28th, 1866.
W'M RITTER, *Clerk.*

EXHIBIT "A."—*In answer.*

The County of Knox in the State of Ohio, doth acknowledge to owe to The Columbus and Lake Erie Railroad Company or bearer the
18 sum of fifty dollars, to be paid at the treasurer's office of said county on the first day of June, 1867, with interest at the rate of six per centum per annum on *on* the successive first days of January of each year, on presentation to the treasurer, of the respective interest-warrants hereto attached. This bond, however, may be paid at any time hereafter, at the pleasure of the commissioners of said county, at the treasurer's office aforesaid, provided the said commissioners shall give three months notice thereof, by publication in some newspaper to be printed in the town of Mount Vernon, in which case if the said commissioners shall provide the necessary means of payment and the holder neglect to present this bond for payment and surrender the unpaid interest-warrants then the interest herein shall thenceforth cease to accrue. This bond is No. 657, of a series of one thousand bonds of this tenor and date, issued under the statute of Ohio, entitled "An act to authorize the commissioners of Knox and other counties to take stock in a railroad," passed February 26, 1846. And the said county doth hereby pledge its faith, and the net profits and dividends of its stock in said railroad to the holder of this bond, for the payment of this indebtedness and interest, and doth hereby obligate itself that its officers shall carry into execution the fourth section of said statute according to its true intent and meaning.

In witness whereof the commissioners and auditor of said county, have hereunto set their names and the seal of said county.

[SEAL.]

J. WITHROW,
ROBERT GRAHAM,
W'M BABCOCK,
Commissioners of Knox Co.
M. M. BEAM, *Auditor.*

MARCH 1ST, 1848.

And afterwards, to wit, on the said 28th day of July, A. D. 1866, the said plaintiffs filed, in the clerk's office aforesaid their demur'er to the answer of the defendants, which is in the words and figures following, to wit:

Demur'er to defendant's answer.

In the court of common pleas of Richland County, Ohio.

THE COMMISSIONERS OF KNOX COUNTY, OHIO, plaintiffs,
vs.
WILLIAM J. MCCOMBS & JOSHUA DAVIS, JR., ex'rs of Robert McComb, defendants.
} Demurrer.

The said plaintiffs now come and demur to the answer of the said defendants, and for cause of demur'er say that said answer does not contain sufficient facts to bar the said plaintiffs' action against them.

W. H. SMITH, *Att'y for Pl'ffs.*

19 *Aug. term, 1866.—Leave to amend ans., and continued.*

And afterwards, to wit, at the August term of our said court, on the 6th day of September, A. D. 1866, on motion to the court by the counsel for defendants, leave is given to the defendants to file an amended answer instanter; and this action is continued.

And afterwards, to wit, on the 8th day of September, A. D. 1866, the said defendants filed in open court their amended answer herein, which is in the words and figures following, to wit:

Amended answer of defendants.

In Richland com. pleas, O.

THE COMMISSIONERS OF KNOX COUNTY, plaintiffs, *against* WILLIAM J. MCCOMB & JOSHUA DAVIS, JR., executors of Robert McComb, deceased, defendants. } Amended answer.

The said defendants, for answer to the petition of the said plaintiffs, say that, by a special act of the general assembly of the State of Ohio, entitled "An act to authorize the commissioners of Knox and other counties to take stock in a railroad," passed February 26th, A. D. 1846, the plaintiffs were authorized, on certain conditions in said act specified, to become subscribers to an amount not exceeding one hundred thousand dollars, to the capital stock of any railroad company by whose road a direct communication should be opened through said county of Knox, and to or near its county-seat; and, in payment of the stock subscribed by them, they were further authorized by said act to issue bonds or obligations of said county of equal amount, payable to such company, to be negotiable, to bear interest at the rate of six per cent. per annum, payable annually at the treasury of the county, and to be redeemable at such times as they might deem expedient, but not over twenty years from date.

The plaintiffs, by virtue of the powers conferred upon them by said act, subscribed one hundred thousand dollars to the capital stock of the Columbus & Lake Erie Railroad Company, and on payment thereof, in pursuance of the provisions of said act, issued the bonds of said county, five hundred of which was of the denomination of $100 each, and one thousand of which were of the denomination of $50 each, (a portion of each denomination being dated November 1st, 1847, and the remainder March 1, 1848, and all of which were made payable June 1, 1867, with interest, payable on the 1st of January of each suc-
20 cessive year. A true copy of the body of all of said bonds, (date, number, and amount excepted,) is hereto attached, marked "A," and made a part of this answer. For the payment of the indebtedness of the county thus created, and the interest thereon, it was expressly provided, among other things, by said act, that the faith of the county and the net profits or dividends upon the stock so subscribed should stand pledged to the holders of said bonds.

The plaintiffs were also, by said act, specially authorized, in order to pay off such indebtedness, to sell and transfer, whenever they might deem the same expedient, any or all the stock so subscribed or owned by said county, but it was expressly provided by said act that no sale or

23 said plaintiffs, and that I believe the statements of the foregoing reply to be true.

W. H. SMITH.

Sworn to before me and subscribed in my presence this 1st day of April, A. D. 1867.

ALEX. C. ELLIOTT,
Clerk Knox Com. Pleas.

And afterwards, to wit, on the twenty-fourth day of April, A. D. 1867, the said defendants, by their attorneys, filed their demur'er to Reply No. 1 of plaintiffs, which is in the words and figures following, to wit:

Demur'er to Reply No. 1.

In the court of common pleas of Richland County, Ohio.

THE COMMISSIONERS OF KNOX COUNTY, OHIO,
vs.
WILLIAM J. MCCOMB & JOSHUA DAVIS, EXECUTORS of Robert McComb, deceased.
} Demur'er to Reply No. 1.

The said defendants now come and demur to said Reply No. 1 of said plaintiffs, and, for cause of demur'er, say that said reply does not contain facts sufficient to constitute a defense in law to the matters set up in said defendants' answer.

A. G. THURMAN,
R. C. HURD,
HENRY C. HEDGES,
Att'ys for Def'ts.

And afterwards, to wit, on the 24th day of April, A. D. 1867, the said defendants, by their attorneys, filed in open court their demur'er to Reply No. 2 of plaintiff', and which said demur'er is in the words and figures following:

Demur'er to Reply No. 2.

In the court of common pleas of Richland County, Ohio.

THE COMMISSIONERS OF KNOX COUNTY, OHIO, plaintiffs,
vs.
WILLIAM J. MCCOMB & JOSHUA DAVIS, EXECUTORS of Robert McComb, deceased.
} Demur'er to Reply No. 2.

The said defendants now come and demur to said Reply No. 2 of said plaintiffs, and, for cause of demur'er, say that said reply does not contain facts sufficient in law to the matters set up in said defendants' answer.

A. G. THURMAN,
R. C. HURD,
HENRY C. HEDGES,
Att'ys for Def'ts.

24 *March term, 1867.—Demur'ers to replies sustained and excepted to by pl'ffs.*

And afterwards, to wit, at the March term of our said court on the twenty-fifth day of April, A. D. one thousand eight hundred and sixty-seven. This action came on to be heard upon the demur'ers of the said defendants to the replys Nos. 1 and 2 of the plaintiffs, and was argued by counsel, and the court being now fully advised in the premises, if of opinion that the said replies and matters therein contained are not sufficient in law to constitute a defense to the matters and things set forth in the answer of the defendants.

It is therefore by the court considered and adjudged that said demur'ers be sustained; to which decission of the court the plaintiffs except; and the court, being of the opinion that the answers of said defendants, and the matters therein contained, is sufficient in law to bar the said plaintiffs from their action against the said defendants.

Judg't for def'ts.

It is now, therefore, by the court further considered and adjudged that the defendants go hence without day and recover of the plaintiffs costs in this behalf expended, taxed at $5 99, and that the plaintiffs pay their own costs, taxed at $10 44.

And afterwards, on the twelfth day of June, A. D. eighteen hundred and sixty-seven, the petitioners in error herein, by W. H. Smith, their attorney, filed in the clerk's office of the district court in and for Richland County, Ohio, their petition in error herein; which is in the words and figures following, to wit:

Petition in error in district court.

In the district court of Richland County, Ohio.

THE COMMISSIONERS OF KNOX COUNTY, OHIO, plaintiffs,
vs.
WILLIAM J. MCCOMB & JOSHUA DAVIS, JR., executors of Robert McComb, deceased, defendants.
} Petition error.

The said plaintiffs say that the said defendants at the March term, A. D. 1867, of the court of common pleas of said Richland County, recovered a judgment by the consideration of said court against the said plaintiffs for their costs, in a certain action then pending in said court,
25 wherein the said Commissioners of Knox County, Ohio, were plaintiffs, and the said William J. McComb and Joshua Davis, jr., executors of Robert McComb, deceased, were defendants, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked "A," and made a part of this petition, and the said plaintiffs aver that there is error in the said record and proceedings in this, to wit:

First. That the said court of common pleas erred in overruling the demur'er of plaintiffs to the amended answer of the defendants.

Second. The said court erred in sustaining the demur'er of defendants to the first reply of plaintiffs.

Third. The said court erred in sustaining the demur'er of defendants to the second reply of plaintiffs.

Fourth. The said court erred in giving judgment for the said defendants when it ought to have been given for the said plaintiffs, according to the law of the land.

Wherefore the said plaintiffs pray that the said judgment may be reversed, and that they may be restored to all things they have lost by reason thereof.

W. H. SMITH,
Att'y for Pl'ffs in Error.

App. of def'ts in error entered.

And afterwards, on the 12th day of June, A. D. 1867, came R. C. Hurd, defendants' attorney, and waived issue and service of process, and entered the appearance of the defendants in error, to wit: "Process waived and appearance of def'ts hereby entered."

R. C. HURD,
Of Counsel for Def'ts.

June term, 1867.—Dist. court.—Order of reservation.

And afterwards, at the June term of the district court of Richland County, Ohio, on the first day thereof, to wit, on Thursday, June 27, A. D. eighteen hundred and sixty-seven, the following order of reservation was made by said court, to wit:

THE COMMISSIONERS OF KNOX COUNTY, OHIO, plaintiffs,
against
WILLIAM J. MCCOMB AND JOSHUA DAVIS, JR., executors of Robert McComb, deceased, defendants.
} No. 14. In error.

This day came the parties, by their attorneys, and, on motion of the plaintiffs, and it appearing to the court that important and di'fi-
26 cult questions are involved in this case, it is ordered that this case be, and the same is, reserved for decision by the supreme court.

And afterwards, on the seventeenth day of May, A. D. eighteen and seventy-one, Rodney Foss, clerk of the supreme court of Ohio, filed with the clerk of the court of common pleas of Richland County, Ohio, a mandate from the supreme court in this case, which is in the words and figures following, to wit:

Mandate from supreme court.

Supreme court of the State of Ohio, of the term of December, A. D. 1869.

STATE OF OHIO, *City of Columbus:*

THE COMMISSIONERS OF KNOX COUNTY, OHIO,
vs.
W. J. MCCOMB ET AL.

This cause came on to be heard on the pleadings and transcript of the

proceedings and judgment of the court of common pleas of Richland County, and was argued by counsel. On consideration whereof, the court is of the opinion that the proviso in section 5 of the act of the general assembly of the State of Ohio, entitled "An act to authorize the commissioners of Knox and other counties, to take stock in a railroad," passed February 26th, 1846; (Ohio local laws, vol. 44, pages 192 & 193,) referred to in the amended answer of the defendants, was repealed by implication, by the 25th section of the act of said general assembly, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1st, 1852, (Swan & Critchfield's Statutes, volume 1, pp. 271, 282,) and that by such repeal the obligation of the contract between said county and the holders of the bonds issued by it in pursuance of said act of February 26, 1846, was in nowise impaired, but if impaired, that the defendants could not set that matter up as a defence in this action; and that, therefor', the said court of common pleas erred in overruling the plaintiffs' demur'er to the amended answer of the defendants.

It is therefore considered, ordered, and adjudged, that, for the error aforesaid, the judgment of said court of common pleas, and its order overruling said demur'er, be, and the same are hereby, reversed, with costs; and, the defendants suggesting that they may ask leave to amend their answer, this cause is remanded to the said court of common pleas for further proceedings according to law; and by request, and on motion of the defendants,

27 and to the end that what is lawful may be done in the premises, it is by the court here certified that, in adjudicating the questions of law arising upon the pleadings, it became and was material to determine whether, by the provisions of the special act of the general assembly of Ohio, entitled "An act to authorize the commissioners of Knox and other counties to take stock in a railroad," passed February 26th, A. D. 1846, if unrepealed, and of the bonds issued and negotiated by said county, as per Exhibit A, referred to in the answer of the defendants in payment for stock subscribed by the county in said railroad; the net profits and dividends of said stock, were, at the time of said sale and transfer thereof, by said county to the testator of the defendants, pledged, in such way and manner, as that the holders of said bonds, to whom the same had been previously negotiated, then held a lien upon the net profits and dividends that might thereafter accrue on said stock, paramount to any right, title, or interest thereto, that, by virtue of said sale and transfer, would, otherwise, be vested in said testator; and whether all and so much of the provisions of said special act as would otherwise have secured such a lien to the holders of said bonds, and have prohibited the commissioners from selling and transferring said stock to the testator upon the terms agreed in that behalf, was not, at the time of said sale and transfer, repealed by section 25 of an act of the general assembly of Ohio, entitled "An act to provide for the creation and regulation of incorporated companies," passed May 1, 1852; and whether, if the effect of said last-named enactment would otherwise be to repeal the said provisions of said special act, it would not violate the Constitution of the United States by impairing the obligation of the contract between the county and the holders of said bonds to hold that said provisions of said special act were repealed, modified, or changed by said section 25 of the act of May 1, 1852.

And it is further certified that, in adjudicating the said questions at issue upon the pleadings, the court did hold, adjudge, and determine that the said provisions referred to of said special act, were repealed by said section 25 of said act of May 1, 1852; and that the obligation

of said contract between the holders of said bonds and the county, in respect to the supposed lien in behalf of said bondholders on said
28 net profits and dividends, was not impaired by such repeal, nor the rights and interests of the testator as purchaser of said stock, in respect to such net profits and dividends, prejudiced by reason of any such supposed previous pledge and lien; but the court further held that if the obligation of said contract with said bondholders, were impaired by said repeal, yet the defendants could not set that matter up as a defense in this action.

Ordered, that a special mandate be sent to the court of common pleas of Richland County to carry this judgment, *and* &c. into execution. Ordered, that a copy of this entry be certified to the clerk of the district court of Richland County for entry, &c.

I, Rodney Foos, clerk of the supreme court of Ohio, do hereby certify that the foregoing judgment, &c., is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court, this twelfth day of May, A. D. 1871.

[SUPREME COURT SEAL.] RODNEY FOOS, *Clerk.*

Supreme court of Ohio.

THE STATE OF OHIO, *City of Columbus:*

To the honorable court of common pleas within and for the county of Richland, Ohio, greeting:

We do hereby command you, that you proceed without delay to carry the within and foregoing judgment of our supreme court of Ohio, in the case of Commissioners of Knox Co., Ohio, vs. W. J. McComb et al. into execution, the writ of error herein and heretofore granted to the contrary notwithstanding.

Witness Rodney Foos, clerk of our supreme court of Ohio, at Columbus, this twelfth day of May, 1871.

[SUPREME COURT SEAL.] RODNEY FOOS, *Clerk.*

Aug. term, 1871, *of com. pleas. Judg't.*

And afterwards, at the August term, to wit, on the twenty-ninth day of August, A. D. eighteen hundred and seventy-one, this case
29 being remanded to this court from the supreme court of the State of Ohio, to which court it was reserved for decision, in due course of law, by order of the district court of this county, at the June term, to wit, on the 7th day of June, A. D. 1867, of said district court, in which the same was pending in error, prossecuted by plaintiffs against the defendants, praying for the reversal of the judgment of this court theretofore rendered therein, at its March term, A. D. 1867, sustaining the demurrers of the defendants to the replies Nos. 1 and 2, of the plaintiffs, and thereupon, that the defendants go hence and recover of the plaintiffs their costs, &c.; by which mandates it is certified and made known to this court that our said judgment in said action had been and is by the consideration and judgment of said supreme court reversed, with costs, and that the defendants, suggesting that they might ask leave to amend their answer, it was thereupon, by said supreme court, ordered that said cause be, and the same was, remanded to this court for further proceedings, according to law.

Whereupon now at the August term of this court, A. D. 1871, to wit,

on the 28th day of August, A. D. 1871, came the parties by their attorneys, and the death of the defendant Joshua Davis, jr., being suggested, and the surviving defendant, William J. McComb, executor, &c., not moving to amend the answer or pleadings as heretofore made up in the case, but electing to rely upon the same, thereupon this cause on to be heard upon the demur'ers of the defendant to the replies of the plaintiffs. On consideration whereof, and it appearing to this court that the first error in the premises according to said decission of the supreme court, is in the answer of the defendants in this, that said answer according to said decission contains no matter sufficient in law to bar the action of the plaintiffs:

It is therefore, in accordance with said decission, and in obedience to said mandate, considered and adjudged by this court that said demur'ers to said replies be, and the same are, overruled with costs. And this court, in further compliance with the said decision, and in obedience to
30 said mandate, going back to the first error committed by this court in the premises, and for the correction thereof, doth now consider, order, and adjudge, in accordance with said decisssion and in obedience to said mandate, that the demur'er of the plaintiff to the answer of the defendants be, and the same is hereby, sustained with costs. And no further leave to amend pleadings being asked, and neither of the parties requiring a jury, and the plaintiffs by their counsel waiving a jury to assess the amount due to the plaintiffs, the court doth find, in conformity with the rulings and mandate of the supreme court, that the defendant, as executor as aforesaid, doth owe to the said plaintiffs, by reason of the premises, and not including the principal of said bond or any installments of interest that have fallen due since the commencement of this suit, the sum of six thousand and fifty-six dollars and forty cents. ($6,050.40.)

It is therefore considered by the court, that the plaintiffs recover of the defendant, in his said capacity as executor of the last will and testament of Robert McComb, deceased, the said sum of six thousand and fifty-six and $\frac{40}{100}$ dollars assessed by the court as aforesaid, together with their costs in and about this suit in this behalf expended, to be taxed by the clerk of this court, to be levied of the goods, chattles, estate, assets, and effects that were of the said Robert McComb, deceased, and which came to the hands of the said executors to be administered. And on motion of the defendant, to the end that what is lawful in the premises may be done, it is by the court ordered that the full record of the proceedings in error had as aforesaid, in and before the district court, and supreme court of the State of Ohio, certified to this court with the mandate aforesaid of the supreme court, be made a part of the record in this case in this court.

31 THE STATE OF OHIO, *Richland County, ss:*

I, Geo. B. Harmon, clerk of the court of common pleas within and for the said county of Richland and State of Ohio, do hereby certify that the above and foregoing is a full and complete transcript of the record of the proceedings had in the foregoing case in our said court of common pleas and the district court of said county, including a complete copy of the record of said court of common pleas, the petition in error in the district court and the order of reservation of said cause from said district court to the supreme court of the State of Ohio; also, the mandate from said supreme court to our said common pleas court and the final judgment of our said court of common pleas.

Witness my hand and the seal of said court of common pleas at the city of Mansfield, Ohio, this 18th day of October, A. D. 1871.

[SEAL.] GEO. B. HARMON, *Clerk.*

32 Know all men by these presents that we, William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, and J. W'm Baldwin, and Lorenzo English, are held and firmly bound unto The County Commissioners of Knox County, in the State of Ohio, in the sum of five hundred dollars, to be paid to them, subject to the conditions following, sealed with our seals, and dated this 11th day of November, A. D. 1871:

Whereas the above-named William J. McComb, surviving executor of the last will and testament of Robert McComb, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment of the court of common pleas of Richland County, in the State of Ohio, in a civil action, wherein the said County Commissioners of Knox County were plaintiffs and the said William J. McComb executor, &c., as aforesaid was defendant:

Now, therefore, this condition is, that if the said William J. McComb, executor, &c., shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

33

WILLIAM J. McCOMB, [SEAL.]
As Executor of Rob't McComb, dec'd.
J. W'M BALDWIN. [SEAL.]
LORENZO ENGLISH. [SEAL.]

Sealed and delivered in presence of—
L. G. BYRNE,
ED. L. D. LANG.

Filed Nov. 11, 1871.

GEO. B. HARMON, *Clerk.*

THE STATE OF OHIO, *Richland County, ss:*

I, William Osborn, the presiding judge of the court of common pleas of Richland County, Ohio, before whom the judgement of said court within-mentioned was recovered, hereby approve of the within bond and sureties for the purposes therein named. Given under my hand this 11th day of November, A. D. 1871.

WILLIAM OSBORN,
Presiding Judge, &c.

THE STATE OF OHIO, *Richland County, ss:*

I, George B. Harmon, clerk of the court of common pleas, within and for Richland County, Ohio, do hereby certify that the foregoing is a full, true, and perfect copy of the original bond now on file in the office of the clerk of the court of common pleas of Richland County, Ohio. Witness my hand and the seal of the court of common pleas within and for said county, this 11th day of December, A. D. 1871.

34

[SEAL.] GEO. B. HARMON, *Clerk.*

(Indorsed:) Sup. Court U. S. 1871 Dec. term. No. 473. McComb vs. Knox County. Copy of appeal bond. Filed 13 December, 1871.

(Indorsement on cover:) No. 473. William J. McComb, surv'g ex'or of Robert McComb, deceased, plaintiff in error, vs. The County Commissioners of Knox County, Ohio. Ohio common pleas court, Richland County. Filed 4th December, 1871.

Sup. Court United States. Robert McComb's executor vs. Commissioners of Knox County. In error.

REC. 473—3

In Supreme Court, United States.

October Term, 1875.

WILLIAM J. McCOMB,
Surviving Executor of ROBERT McCOMB, *decea'd*,

vs.

THE COUNTY COMMISSIONERS
OF KNOX COUNTY, OHIO.

IN ERROR.

This is a writ of error to the Supreme Court of Ohio. The action was brought by the defendants in error upon an obligation, of which the following is a copy:

"In consideration of one hundred shares of the stock of the Columbus and Lake Erie Railroad Company, transferred to me by the county commissioners of Knox county, Ohio, I do promise to pay to said county commissioners of Knox county aforesaid the sum of $5,000, on or before the 1st day of June, A. D. 1867, with interest to be paid annually, on the 1st day of October, from and after the 1st day of October, A. D. 1853, payment of which said principal sum, or any part thereof, may be made at the office of the county treasurer of said county in money or in the bonds of said Knox county issued in payment of said county's subscription for its stock in said railroad company, to be evidenced by said treasurer's receipt therefor, and in like manner

the interest to accrue on this obligation shall be paid to said treasurer, at his said office, in money, or by the application of interest accrued upon the bonds above named of the county.

"Given under my hand, this 30th day of September, A. D. 1853.

ROBERT MCCOMB."

The county acquired its stock in the said railroad company under the provisions of a special act of the legislature of Ohio, passed February 26, 1846, which (omitting what is immaterial) reads as follows:

AN ACT to authorize the Commissioners of Knox and other counties to take stock in a railroad.

"SEC. 1. *Be it enacted by the General Assembly of the State of Ohio*, That whenever a majority of the qualified electors of the counties of Delaware, Marion, Holmes, Medina, Crawford, and Knox, respectively, shall consent thereto, as provided in the sixth and seventh sections of this act, it is hereby made the duty of the commissioners of said counties, respectively, for and in behalf of their respective county, to become subscribers to an amount not exceeding one hundred thousand dollars to the capital stock of any company heretofore or which may hereafter be incorporated to construct any railroad which of itself, or in conjunction with other companies, may open a direct communication through their respective county, and to or near its county seat.

"SEC. 2. That the commissioners of each of the said counties, in payment of any amount of stock subscribed under this act, shall issue or cause to be issued, bonds or obligations of the county, of equal amount, payable to said company and made negotiable, bearing interest, to be paid annually at the treasury of said county, at the rate of six per cent., and redeemable at such time

as may be deemed expedient by the commissioners, not over twenty years from date.

"SEC. 4. That the faith of the county, so subscribing stock under the provisions of this act, and the net profits or dividends upon the stock subscribed by the county to such company, shall stand pledged for the payment of the indebtedness and interest which may become demandable from the county, under this act; and it is, moreover, hereby made the duty of such commissioners and the auditor of the county, from and after any indebtedness of the county arising, under this act, against the county, to add such per centum upon the tax duplicate of the county annually, over and above the ordinary State and county taxes, as shall be sufficient, including the dividends aforesaid, to pay the accruing interest arising under this act; and, also, to produce a sinking fund of such amount as they may deem expedient, and the money so levied shall, when collected, be applied to the purpose aforesaid, and to none other.

"SEC. 5. That the commissioners of such county shall, by themselves or such agents as they may appoint, have full power to vote at all meetings of stockholders of said railroad company, in proportion to the stock owned by the county, and in all other respects to act in behalf of the county in the business of said company, as may be in accordance with law and best calculated to promote the true interests of the company without injustice to the county; and, moreover, *the said commissioners are hereby authorized, whenever they may deem the same expedient, to sell and transfer any and all stock of the company subscribed or owned by* the county, *in order to pay off the indebtedness which may arise under this act: Provided, however, That no sale or transfer of the stock thus owned by the county shall be of any force, except upon condition of its*

producing its full par value, and the actual extinguishment or cancellation of an equivalent amount of obligations of the county created under this act."

Passed February 26, 1846.

A vote was taken of the electors of the county of Knox, and subscription authorized to the stock of the railroad. The commissioners thereupon subscribed $100,000 to the stock of the road, and in payment of the same issued the bonds of the county for $100,000, payable on the 1st of June, 1867, with annual interest at six per cent.

On the 1st of May, 1852, the legislature passed an act, the 25th section of which is in these words:

"The commissioners of any county, the city or town council of any city or town, and the trustees of any township, which county, city, town, or township *has heretofore subscribed* to the capital stock of any railroad company, or turnpike or plank road company, and *has issued*, or shall hereafter issue, any bonds for the payment of such subscription, are *hereby authorized to sell the said stock, or any part thereof, and on such terms as they shall deem to be for the interest of said county, city, town, or township, respectively*, and may apply the proceeds of such sale to the payment of the bonds of such county, city, town, or township, respectively, subscribed."

Under the authority conferred by this section the commissioners on the 30th of September, 1853, sold to Robert McComb one hundred shares of $50 each of the stock of the county in said railroad company, and in payment therefor McComb gave the obligation above recited.

His executor sought, in the court below, to avoid liability on several grounds. He claimed—

1. That the sale to McComb was on credit and was not a sale at par.

2. That the sale did not produce an actual extinguish-

ment or cancellation of an equivalent amount of the bonds of the county.

3. That it violated the obligation of the contract made by the special act with the holders of the bonds, by which the faith of the county and the net profits or dividends from the stock were pledged to them.

The Supreme Court of Ohio overruled these objections and gave judgment for the defendants in error.

Com'rs of Knox County vs. McComb's Executors, 19 Ohio State, 320.

The first question to determine is whether any Federal question arose in the case which will give this court jurisdiction, and if so whether it was decided correctly.

Murdock vs. City of Memphis, 20 Wall. 590.

No Federal question did arise, because there was no allegation that any profits or dividends had ever accrued on the stock. This suit was brought more than twelve years after the purchase by McComb, and if there had been any profits or dividends he would certainly have alleged it, and if there had been any default by the county in the payment of interest, he would have alleged that also. The law presumes that he would state his own case as favorable as the facts would justify. Having failed to plead that profits or dividends had accrued, this court has the right to say that there were no such profits, and therefore that no pledge of them has been violated.

But if the court should be of the opinion that a Federal question did arise, then I insist that it was properly decided. The contract made by the commissioners, was not in derogation of the rights of the bond holders, for the following reasons:

1. The stock, at the time of the sale, was transferred to the commissioners as a security for the payment of McComb's obligation. It thereafter stood in their name,

and they had the sole right to control the disposition of whatever profits or dividends might accrue. If the bond holders had not received their interest, and had insisted upon their pledge, it would have been the duty of the commissioners to apply the profits or dividends for their benefit, and being sworn officers, the law presumes that they would have done their duty.

2. McComb had it in his power to apply both interest and principal on the bonds. His contract expressly stipulates that he may make payment of principal in the bonds of the county, and that he may pay the interest that accrues against him, either in money, "or by "the application of interest accrued upon the bonds "above named of the county." He was therefore entirely safe. He could have fulfilled the statutory pledge. He did not either apply the interest on the bonds, or pay the money to the commisioners to enable them to do so. He failed to comply with his contract, and should not be allowed to allege that his failure had produced complications which would have been avoided, if he had not been in default.

3d. The statutory pledge was for the benefit of the bond holders, and not for the holders of the stock. If the bond holders did not complain, no one else could. McComb was a stranger to the pledge. He cannot insist that the rights of the bond holders were put in jeopardy. I think this is so well settled by the decisions of this court that I shall not dwell upon it.

Owings v. Norwood's Lessee, 5 Cranch, 344.
Williams v. Norris, 12 Wheat., 117.
Montgomery v. Herandy, 12 Wheat., 129.
Henderson v. Tennessee, 10 How., 311.
Walworth v. Kneiland, 15 How., 348.
Hale v. Gaines, 22 How., 144.
Verden v. Coleman, 1 Black, 472.

I conclude that the federal question was decided correctly by the Supreme Court of Ohio, and that this court having reached that result, will proceed no further with the case.

Murdock v. City of Memphis.

But if I should be mistaken in this, then I insist that the case was properly decided upon other grounds.

The act of 1846 was repealed by the 25th section of the act of 1852, which authorized the sale in question.

The two acts are inconsistent and cannot stand together. The former is therefore repealed by implication.

Sedg. Cons. and Stat. Law, 124.
Nassa v. Commonwealth, 25 Penn. State 126.
Fair v. Bracket, 40 Vt., 344.
Comms. v. Potts, 10 Ind. 286.
De Pauw v. City of Albany, 22 Ind., 204.
Johnston's Estate 33, Penn. State 511.
Moore v. Vance, 1 Ohio, 1.
Plank Road v. Colton, 12 Ohio State, 263.
Bartlett v. King, 12 Mass. 545.
Mullen v. People, 31 Ill., 444.
Wakefield v. Philps, 37 N. H., 295.
Norris v. Crocker, 13 How., 429; and especially
Murdock v. City of Memphis, 20 Wall, 590.

I might urge, as I did in the court below, that the sale to McComb was authorized by the local act of 1846, but I deem it unnecessary, and shall submit the case by inviting the careful attention of the court to the opinion of Judge Scott, as reported in 19th Ohio State, 320.

Respectfully submitted,

W. H. SMITH,
Attorney for Defendant.